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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 291.

EMIL HANSEN, PETITIONER,

VS.

ST. JOSEPH FUEL OIL AND MANUFACTURING COMPANY, CLAUDE STEVENSON AND HARVEY HOYT, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Circuit entered May 17, 1950.

Opinion Below.

The Court of Appeals opinion is reported in 181 F. 2d 880.

Federal Jurisdiction.

Petitioner, a farmer, and a citizen and resident of Iowa, instituted this suit on April 28, 1948 (R. 1), in the

St. Joseph Division of the United States District Court for the Western District of Missouri against the St. Joseph Fuel Oil and Manufacturing Company, Claude Stevenson and Harvey Hoyt, citizens and residents of Missouri, residing at St. Joseph, Missouri, praying damages in two counts, aggregating $60,500. From an adverse judgment (R. 153) entered on September 24, 1948, as the result of a jury trial in defendants' home town, after unsuccessfully moving for a new trial duly and timely filed October 2, 1948, and overruled May 19, 1949 (R. 157), petitioner duly and timely appealed to the said Court of Appeals (R. 158).

Jurisdiction of Supreme Court.

The judgment below was entered May 17, 1950 (R. 176), affirming the said District Court's judgment entered September 24, 1948 (R. 153). Petition for rehearing filed May 31, 1950 (R. 192), was denied without any opinion or reason on June 13, 1950. Mandate by agreement of parties duly filed was stayed pending filing of this petition for certiorari until September 11, 1950 (R. 193). Jurisdiction of this Court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code, effective September 1, 1948.

Summary of Matter Involved.

Petitioner, Emil Hansen, plaintiff, a farmer living near Portsmouth, Iowa (R. 51), alleged in his complaint for damages and proved that on November 6, 1947, about 10:30 A. M., he was driving from his farm near Portsmouth, Iowa, with his wife in an Oldsmobile automobile on State Highway No. 169 to visit his son living at Appleton City, Missouri, and while moving south on said Highway on the concrete paved portion of the west side thereof designated and marked for southbound vehicles and traffic, near

Smithville in Clay County, Missouri, a large oil transport truck, 33 feet in length and loaded with 2,950 gallons of fuel oil, the truck and load weighing 40,000 pounds (R. 101) and operated by defendants and respondents in a northerly direction on the east half of said highway in the northbound lane thereof negligently on a descending 5 per cent grade (R. 14) on a double hill with an "S" curve suddenly turned over into the southbound lane of travel and immediately collided head on with Hansen's automobile (R. 55) then moving southward in his lane at a speed of about 40 m. p. h. killing his wife and seriously injuring Hansen and damaging his automobile (R. 9).

Defendants' and respondents' claim and evidence at the trial was that while descending moving northward in the northbound lane of travel on the first hill with a 5 per cent descending grade at a speed of about 40 miles per hour the brakes on their oil transport refused to work or "went out" and being without brakes, and the transport gaining speed, and running away with no control of speed, in order to avoid a collision with a northbound truck loaded high with fence posts and proceeding ahead northward in the northbound lane of travel, the oil transport truck while on the curve of the second hill with a 5 per cent down grade, was suddenly when about 4 feet behind the post truck turned out onto the west side of the pavement into the southbound or Hansen lane of travel where it near the bottom of the hill collided headon with the Hansen automobile (R. 80, 107, 108), further claiming in short that Hansen was guilty of contributory negligence in not getting out and keeping out of the way of the runaway oil transport truck (R. 4, 5) notwithstanding the motor vehicles were approaching each other at a combined speed of around 100 miles per hour leaving at most only seconds before contact. No evidence

was offered at the trial as to what caused the brakes on the oil transport to not operate or that the alleged emergency claimed was not due to the negligence of the defendants to keep the brakes in a proper state of repair.

In submitting the case to the jury the trial judge refused ten separate written requests, two of which were peremptory and the remaining eight on the submission to the jury, tendered to the judge before the oral charge at the close of all the evidence, by the plaintiff and petitioner, allowing exceptions thereto (R. 142 to 150) and proceeded to orally charge the jury. The Court of Appeals considered the two peremptory requests but refused to consider the remaining eight requests.

The trial judge as the Court of Appeals opinion shows (R. 172) in "so many instances" in his oral charge (R. 134 to 142) so confused the words "plaintiff and defendants" in referring to the parties that had the trial judge "refused to correct the resulting confusion at the request of either of the parties, a verdict against the objecting party could not have been permitted to stand." Petitioner contends the alleged correction (R. 151), which at most pertained only to degree of care, was insufficient and only tended to more confuse, and prevented a fair trial to petitioner of at least a worthy, meritorious cause of action, if not one entitling petitioner to a directed verdict on defendants' negligence. There were also other errors in the trial judge's oral charge, the principal one of which was refusing to instruct the jury that the defendants had to show or establish that the emergency claimed by defendants with respect to the brakes on the oil transport not working or "going out" was not the result of negligence on the part of the defendants in order to claim an emergency, which is the settled law of Missouri, and was

invoked by the petitioner in his said refused requests (R. 147, 148, 149).

Reason Given for Refusal to Consider.

The Court of Appeals refused to consider the trial Judge's refusal of petitioner's said 8 requests of the 10 requested (R. 175) for the reason that in taking his objections or exceptions he did not "direct the attention of the trial Court specifically to the alleged points of conflict between the Court's charge and the law as stated in appellant's requests, further stating "neither this Court nor the trial Court is under the duty of assuming the burden of comparison and analysis of the charge given and the instructions requested which appellant attempts to place upon them" (R. 175).

What Record Shows As to Exceptions.

The record shows at the conclusion of the judge's oral charge the following with exceptions occurred (R. 142 to 150):

> "The Court: Gentlemen, what exceptions do you have to the Court's charge?
>
> Mr. Miller: May it please your Honor, on behalf of the plaintiff I take it the Court will allow us exceptions to such of the charges as we have heretofore requested of your Honor, insofar as they are in conflict with what your charge has been to the jury.
>
> The Court: Those instructions have been marked 'refused' and will be deposited with the clerk.
>
> Mr. Miller: I also except to the reference of the Court that in the death of Mrs. Hansen the jury may not consider loss of companionship.
>
> The Court: All right. That was requested by the defendant, I believe?
>
> Mr. Kaufmann: That is right.

The Court: How about you, Mr. Garvey?

* * * * * * *

Mr. Kaufmann: Except this, your Honor, am I correct if you have marked any of ours 'refused' our exception will be saved likewise?

The Court: Well, now gentlemen, for the sake of this record, you know I doubt very much if you can preserve any of your exceptions unless you dictate them into this record. That is the rule. You have to save exceptions at the close and dictate them into the record before the Court of Appeals will consider them. *You may say that the Court erred in refusing to give instructions so and so, or erred in giving instructions asked by the plaintiff* (Italics ours).

Mr. Miller: I thought they were trying to simplify things.

The Court: I know, but when you get into the sections—

Mr. Miller: If you will let me have mine—

The Court: Isn't that true?

Mr. Miller: I couldn't say; it may be. The last decision may have changed it.

Mr. Garvey: I believe you saved your exceptions.

Mr. Miller: We have always practiced the way I have done it here, but there may be a late decision.

Mr. Kaufmann: I haven't given any numbers to mine at all. I just dumped them on your desk.

Mr. Miller: The plaintiff excepts to the refusal of the Court to give his separate motion for a directed verdict as against defendant, St. Joseph Fuel Oil and Manufacturing Company, and ask it be marked as Plaintiff's Instruction 1.

The plaintiff excepts to the refusal of the Court to give the separate motion of plaintiff for a directed verdict as against the defendants, Claude Stevenson and Harvey Hoyt, and marked Plaintiff's Instruction 2.

The plaintiff excepts to the refusal of the Court to give Plaintiff's Instruction Number 3.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 4.

The plaintiff excepts to the refusal of the Court to give its Instruction Number 5.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 6.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 7.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 8.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 9.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 10.

(Which said Plaintiff's Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, so offered by the plaintiff and refused by the Court, over the exceptions of the plaintiff, are in words and figures as follows:)"

Then follows set out in full the ten (10) separate requests of petitioner, with the word refused at the bottom written by the judge (R. 145).

What Trial Judge Said As to Refused Requests.

The petitioner in due time filed (R. 153) his motion for new trial asserting error in refusing each of petitioner's ten (10) requests, further asserting error in the judge's oral charge stating specifically wherein the charge was in error. In passing upon the motion for new trial the trial judge in his "Memorandum and Order" (R. 157) said in part:

"Plaintiff has filed a motion for new trial, alleging as error the court's refusal to give certain instructions asked by the plaintiff and presented to the court prior to its charge to the jury. *The questions of law submitted by plaintiff in those instructions were fully considered by the court prior to the charge to the jury*" (Italics ours).

The Court of Appeals on this record refused to consider at all the refusal of the petitioner's Nos. 3 to 10, inclusive, of the said requests or the admitted errors in the oral charge of the judge to the jury for the reasons above set forth.

Questions Presented.

A.

Has the Federal Court of Appeals on the record made properly construed Rules 51 and 46 of the Federal Rules of Civil Procedure in refusing to consider or review at all the action of the trial judge in the refusal of petitioner's Nos. 3 to 10, inclusive, separate requests? (R. 147 to 151.)

B.

Where petitioner at the close of all the evidence tendered to the trial judge ten written separate requests (R. 145) covering the law of the case as he conceived it to be and the trial judge with the requests before him on the bench then orally charges the jury, and then writes on each of the requests at the bottom "refused" and gives them to the clerk for filing allowing petitioner exceptions thereto, and in fact informs counsel for both sides how their exceptions may be saved by stating in part (R. 144) "*you may say the Court erred in refusing to give instructions so and so, or erred in giving instructions asked by the* plaintiff," and such course was followed, and the trial judge said in overruling the motions for new trial (R. 157), "The questions of law submitted by plaintiff *in those instructions were fully considered by the Court prior to the charge to the jury,*" was such not sufficient for the petitioner to be entitled to a review of the remaining eight of the requests by the Court of Appeals as to error claimed in their refusal by the trial judge under Rules 51 and 46 of the Rules of Civil Procedure?

C.

Where the trial judge in seven instances designates the wrong party in charging the jury (R. 134 to 142) and the Court of Appeals holds the confusion caused thereby could not be permitted to stand without correction, and appellees direct the Court's attention to the confusion and the judge attempts to correct, but as petitioner contends did not remove the confusion, may petitioner be held to have accepted the alleged clarification (R. 151) of the original charge as sufficient because petitioner made no objection or the exception was too broad? And is the ruling that the alleged clarification was sufficient right? And when the jury requests clarification and the judge attempts clarification and the exception thereto is no broader than the clarification is not the exception sufficient to entitle review? (R. 152.)

SPECIFICATION OF ERROR.

The Court of Appeals erred:

(1) In holding on the record made as heretofore set forth that petitioner under Rules 51 and 46, of the Federal Rules of Civil Procedure was not entitled to consideration of whether the trial judge committed error prejudicial to petitioner in refusing the remaining eight of the ten separate requests, being Nos. 3 to 10, inclusive, having considered the first two being peremptory on the question of negligence of defendants.

(2) In holding on the record made that petitioner was not entitled to a review by the Court of Appeals of the refusal by the trial judge of eight of the ten separate written requests.

(3) In holding after admitting the errors in the oral charge of the trial judge in designating in seven instances

the wrong party, that the same was later properly corrected at the suggestion of appellees (R. 173) and that Petitioner must be held to have accepted the alleged clarification, in the absence of objection, and in further holding that in the absence of objection the clarification "met the test" required, and in still further holding when the jury requested further clarification by asking if "both parties be found to be negligent is it possible to return a damage in favor of plaintiff?" (R. 151, 152), that petitioner's objection because too general "presents nothing for review" (R. 174).

(4) Because the holding of the Court of Appeals denying to petitioner a right of review of the refusal by the trial judge in refusing eight of the ten requests of petitioner and that the seven admitted errors in the oral charge of the judge were properly clarified in the absence of objection or objection too general are in conflict with rulings of other Courts of Appeals on the same matter or has decided an important question of Federal law which has not been or should be settled by this Court, or has decided a Federal question in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT.

I.

In refusing to consider or review the refusal of the trial judge of petitioner's 8 of the 10 separate written requests (R. 147, 150), **the Court of Appeals (1) improperly construed Rule 51 of the Federal Rules of Civil Procedure, with respect to alleged failure of sufficient objections or exceptions** (R. 175), **and (2) erroneously denied petitioner on the record made a consideration or review of the error of the trial judge in refusing said requests, and (3) erroneously held that admitted errors in the oral charge were sufficiently afterwards clarified by the judge, in the absence of no objection or objection too general** (R. 174), **and (4) erroneously held that the objection was too general covering a clarification requested by the jury.**

It will be noted in the Court of Appeals opinion (R. 175) that the Court only mentioned the first objection made by petitioner and makes no mention of the exceptions taken and allowed by the trial judge to his refusal of petitioner's 8 of the 10 written requests, which were taken at the trial judge's suggestion (R. 144). It should also be kept in mind that when overruling the motion for new trial the trial judge said he (R. 157) "had fully considered" the requests "prior to the charge to the jury," which makes a record showing the same were called to the trial judge's attention, which is the foundation or reasons for objections or exceptions. Mr. Garvey of counsel for respondents said to counsel for petitioner at the time, "I believe you saved your exceptions" (R. 144). All understood the reasons for the exceptions. We thought the Court had inadvertently overlooked the objections or exceptions, but as the Court overruled the petition for re-

hearing without opinion it appears not (R. 193). The Court of Appeals was bound by what the whole record indisputably shows, and the question is was the record sufficient to entitle petitioner to a consideration or review of the trial Court's refusal of his said requests.

Construction of Rule 51.

First, we assert that petitioner complied with Rule 51, with respect to filing with the trial Court petitioner's "*written requests.*" The first sentence of this rule provides for such. The second sentence requires the Court to inform counsel of its proposed action on the "*requests*" before the "arguments" and that the Court shall instruct the jury after the arguments. Now when the Court refuses the requests as the trial judge did, then exceptions taken to the action of the Court were allowable and taken as required, and in this connection Rule 46 entitled "exceptions unnecessary," which says "Formal exceptions to rulings or orders of the Court are unnecessary" should be considered as the Court ruled in an opinion by the eminent Judge Learned Hand in *Wright* v. *Farm Journal, Inc., et al.*, (2 C. A.) 158 F. 2d 976, 978, and *Sweeney* v. *United Feature Syndicate,* (2 C. A.) 129 F. 2d 904.

At the time of the oral charge of the trial judge these refused requests lay on the bench before the judge and spoke for themselves, and the trial judge admitted in his memorandum overruling the motion for new trial he had "*fully considered the requests prior*" (R. 157) to making his oral charge, which means that the judge had rejected the requests because not the law. Such shows not only the rejection by the trial judge but the record shows the judge suggested the *form of the objections or exceptions as sufficient* for the Court and having satisfied the trial judge, what merit is there to the Court of Appeals' con-

tention that on the point it makes that more specific objections or exceptions should have been made to the trial judge in that they should point out the conflict between the oral charge and the refused requests. When the trial judge had ruled the requests not the law and exceptions taken to the refusal, why should petitioner be required to go further and specifically point out wherein the oral charge differed from the refused requests? What is the sense of such?

Must the objections or exceptions point out to the judge why the requests are the law of the case and the point of conflict between the oral charge and the requests? Do not the requests and oral charge speak for themselves? Did the trial judge not know the conflict and the points of law set forth in the refused requests which were not declared and refused in his oral charge to the jury? He should, and why should this be required of the party's lawyer, who may assume the judge knows what he is doing? We submit the record made shows compliance with Rule 51 with respect to the requests.

Second, in the next and third sentence of Rule 51, it is stated that no party may assign error as to the giving or the failure to give an *"instruction"* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. In the first two sentences of the rule "written requests" are referred to and involved while in the third sentence only "an instruction" is referred to and involved. We urge the use of the words *"requests" and "instruction"* is significant and used advisedly, and that the third sentence means and refers to only the oral charge of the judge and not to written requests. Otherwise, why does the rule in the first instance use the word "requests" and then in the third sentence use the word

"instruction"? However, in any event there is nothing in the rule requiring the objection or exception to specifically point out the points of conflict between the Court's charge and the law as stated in appellant's requests. Such is something the Court of Appeals is writing into the rule that is not there.

In this case the trial judge says he "fully considered" the requests which was his duty and prerogative as judge, and being "fully considered" he refused them and was satisfied with the exceptions. The trial judge knew what his charge was, and he knew what the requests were which lay on the bench before him for he says and admits he had "fully considered" them and refused them. He did not request counsel to point out the points of conflict between the requests and his oral charge. Would he not already know and particularly so when he admits he had "fully considered" them and refused them? Is petitioner required to point out what the judge already knows after a full consideration of the requests? Would the trial judge have refused the requests and allowed exceptions if he had not considered there were conflicts between the requests and his oral charge? We think not. We submit the Court of Appeals has misconstrued and misinterpreted Rule 51 on the record as made in this case.

Third, the seven admitted errors in the oral charge of the judge in seven times designating the wrong party, being bound to cause great confusion to the jury, were not sufficiently corrected or clarified. The Court of Appeals in the first attempt of the trial judge to correct these seven errors held that petitioner accepted the clarification and waived such in the absence of objection. Such holding we urge is not proper under Rules 51 or 46, or the law, and in conflict therewith (R. 173). It is the law that when a correction is made in a charge to the jury such

must be done "in clear and unmistakable terms," and "must leave no doubt in the minds of the jury," and must as this Court held in *McCandliss* v. *U. S.*, 298 U. S. 342, 347, 56 S. Ct. 764, 766, "affirmatively appear from the whole record that the error was not prejudicial." Cf. *Baer Bros.* v. *Palmer et al.*, (10 C. A.) 158 F. 2d 278, 280, 281; *Louisville and N. R. Co.* v. *Johnson,* (C. A. 7) 81 Fed. 679, 681; *Puget Sound Nav. Co.* v. *Nelson,* (C. A. 9) 59 F. 2d 697, 700. We think the form of charging a jury in the Federal Courts should also be kept in mind, in that the jury do not take the charge in writing with them to the jury room, as in our state court where they may read and discuss it, but must trust to memory, which all the more requires that there should not be confusion.

To "soften" the rigor of its holding the Court of Appeals mentions that petitioner's degree of care was stated more favorably than required, which we deny, but even so one error may not be offset by another. But the Court it appears did consider the alleged correction or clarification (R. 174) in connection with and considering no objection made saying "We think the Court in his effort to correct the orginal instruction met the test of this case." Here we call attention to this Court's ruling in the *O'Donnell case, post,* where this Court did consider upon the premise that the Court of Appeals had considered, but erroneously. The ruling of the Court of Appeals was wrong and is in conflict with the ruling of this Court and the respective Courts of Appeals in the above cases in the immediate preceding paragraph.

Further when error is admitted and an attempt is made by the judge to correct it, such previous admitted error is not prevented of review because of no objections, and as to whether it was corrected or more confusion resulted, cannot under the law avoid review because of the

lack of objections or objection too general when the purpose of an objection or exception is considered and the judge already knows the points of contention as in the case at bar. It seems to us the Court of Appeals has erroneously struggled too hard with technicality to avoid review of the merits.

And again when the jury was in trouble as to the meaning of the judge's charge with respect to whether petitioner could recover if both parties were found negligent (R. 151, 152) we were again met with technicality against review because petitioner's objection was allegedly too broad to present anything for review (R. 174). Certainly the reply or answer of the trial judge to the question of the jury was too general on what at the least was a most important point in the case, and petitioner's objection was not a "general objection" or not specific enough to reach or point out the error of the answer made by the judge, and the refusal of the Court to *consider it* on review is an erroneous holding under the cases cited by the Court and Rule 51, and in conflict with the settled law.

Conflict with Other Courts of Appeals.

The Court of Appeals ruling we urge is in conflict with the recent opinion of this Court in *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct., pages 200, 206, in which this Court granted certiorari on the Seventh U. S. Court of Appeals, 171 F. 2d 937, 976, and reversed the Court of Appeals as to a holding that the exceptions were insufficient to warrant review of certain requests of law urged by the plaintiff, this Court rather casting aside the technical holding of the Court of Appeals and went direct to the merits of the exception saying at page 206:

> "Criticism is made that petitioner's requests to charge were not sufficiently specific. That they were

somewhat general in statement and were cast in terms of a negligence case is true. But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided, and in deciding this question the way it did, we believe it has fallen into error. We make no examination of the charge insofar as it related to the issue of general negligence." Reversed.

In the case at bar the trial judge admits and says he "fully considered" petitioner's separate requests and must have been satisfied with the exceptions for which he pointed the way. Does not the O'Donnell case then in the light of the record in the case at bar disapprove the viewpoint and holding of the Court of Appeals?

In *Cal-Bay Corporation et al.* v. *United States,* (C. A. 9) 169 F. 2d 15, 19, the Court held in an identical situation contrary to the Court of Appeals in the case at bar, that such an exception as in the case at bar was sufficient, the Court of Appeals for the Ninth Circuit at page 18, saying:

> "In this situation appellants requested an instruction that, in the determination of the value of gas and oil leases, it may be based on the reasonable possibility of production in paying quantities, even though there were not a reasonable probability shown of such value.
>
> Due exception to the denial of this requested instruction was made and the prejudicial effect of this claimed error was strongly argued here. It was made a section of appellants' brief entitled '6. The Court erred in refusing appellants' requested instructions on market value,' in which it was said of the refusal to give this requested instruction 40 and two others that 'Each was designed to correctly inform the jury that market value could be based on reasonable possibilities or speculative elements. The jury was told the contrary. Therefore, the refusal of each of these instructions was prejudicial error.'

> (5, 6) There is thus no merit to the statement that appellants 'made no claim either here or below that (the requested instruction) was negatived by any charge actually given.' *Nor is there merit in the novel contention that the excepted refusal to give a proper and needed instruction becomes valueless if there is no exception taken to a differing and erroneous instruction.*
>
> We think the district court erred in refusing such an instruction" (Italics ours).

Can there be any doubt of the conflict? We think not. In the above case there was no negative exception taken to the oral charge or other instructions and the court wisely and righteously held such was not necessary. Should this Court not settle which is right so lawyers may know the proper procedure on so important a matter of procedure occurring almost daily just as this Court did with respect to Rules 26, 33, 34, 35, pertaining to discovery in *Taylor* v. *Hickman,* 329 U. S. 495, 67 S. Ct. 385, about which there was conflict in the different U. S. Courts of Appeals?

In *Good Holding Co.* v. *Boswell,* (C. A. 5) 173 F. 2d 395, no exceptions were taken to the oral charge of the trial judge, but the Court of Appeals as to the written requests refused by the trial Court considered the written requests (which is in direct conflict with the Court of Appeals in the case at bar) saying at page 401:

> "As for the written charges requested and refused by the court, a careful consideration of each of them discloses that every relevant and legal charge requested was substantially covered in the court's oral charge. The issues were all properly submitted, and we find no prejudicial error in either the oral charges given or the requested charges refused." Citing cases.

In *Allen* v. *First National Bank,* (C. A. 5) 169 F. 2d 221, 225, no exceptions were taken to the general charge of the Court, but the Court considered the refused requests asked by the defendant, the Court at page 225, saying:

> "When we come to the refusal of the instructions asked by the defendant to determine whether there was reversible error, in refusing them it must be kept in mind that the requests may not be considered as abstractions. They must be considered in the light of the whole record, including the general charge to which no exception was taken, and in the light of the statute governing hearings on appeal."

In *Drohan* v. *Standard Oil Co.,* (C. A. 7) 168 F. 2d 761, 764, the Court considered refused requests (contrary to what the Court of Appeals refused to do in the case at bar) at page 764, saying:

> "We now consider the contention that the court erred in refusing to charge the jury as requested by Nichols and defendant. * * * All that need be said is, that we have read the refused instructions as well as the instructions given by the court covering these questions. The given instructions properly and fully announced the correct propositions of law applicable to the case; hence no error was committed in refusing to give the tendered instructions." Citing cases.

In *S. S. Kresge Co.* v. *Holland,* (C. A. 6) 158 Fed. 495, 499, the Court considered the refused requests of the defendant (contrary to what the Court of Appeals refused to do in the case at bar) at page 499, saying:

> "Following Rule 51, of the Rules of Civil Procedure, appellant submitted to the court six requests for instructions, all of which were denied. It is admitted that Requests Nos. 1, 2 and 3, were covered in the general charge. Request No. 4, was as follows

> * * * This request was properly denied because the effect of it was to relieve the appellant of negligence if it did not know that its floor dressing had qualities which would make it dangerous * * * In so far as Requests Nos. 5 and 6, correctly stated the law, these were sufficiently given in the general instructions."

In *Lemley* v. *Christophersen,* (C. A. 5) 150 F. 2d 291, 292, the facts were the trial judge stated "either side might have an exception" to the charge as given, and the record "shows no specific objection" made at the time, yet the Court considered the refusal by the trial Court of two requests "because the appellee's brief concedes that the refusal to charge the two requests made by appellant occurred," which is contrary to what the Court of Appeals in the case at bar refused to do.

In *Home Ins. Co.* v. *Tydal Co.,* (C. A. 5) 152 F. 2d 309, 310, the Court considered written requests when the objections to the Court's charge was held to be too general.

In *Sweeney* v. *United Feature Syndicate,* (C. A. 2) 129 F. 2d 904, the eminent Judge Learned Hand writing the opinion considered a request to charge being No. 12, when no exception had been made according to the record, said:

> "Here it appears that there was full discussion of the point raised which adequately informed the court as to what plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality. Cf. *Stoltz* v. *United States,* (Ninth Circuit) 99 F. 2d 283, 284. Those cases construing Rule No. 51, F. R. C. P., strictly all involve situations where no indication was given to the judge that error would be assigned to his ruling."

Is not the ruling of Judge Hand above in conflict with the ruling of the Court of Appeals in refusing to consider

the requests of petitioner in the case at bar? What is the effect of the trial judge saying he fully considered the refused requests? Is such not an admission that the points of law, as declared in the requests, were fully understood by the judge? Why did he refuse the requests and grant the exceptions? And again is not the ruling of the Court of Appeals not in conflict with the following Wright case by the same Court?

In *Wright* v. *Farm Journal, Inc.*, (C. A. 2) 158 F. 2d 976, 978, the Court said:

> "The request for a further instruction was in essence equivalent to an objection to the charge, which had left to the jury the question as formulated by the judge whether the words, 'used in the article were or were not libelous.' Under Federal Rules of Civil Procedure, Rule 46, 28 U. S. C. A., following Section 723c: 'Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; * * *.' *So far as Rule 51 requiring written requests to be submitted at the close of the evidence might have any pertinency to the case at bar it must be construed in the light of Rule 46. Williams* v. *Powers,* (6 Cir.) 135 F. 2d 153, 156" (Italics ours).

The case of *Williams* v. *Powers,* (6 C. A.) 135 F. 2d 153, 156, cited in the *Wright case, supra,* is almost like the case at bar except in the case at bar exceptions were taken as suggested by the trial judge while in the Williams case no objection or exception was taken to the refused requests, the case, an automobile collision case occurring on highway, as in the case at bar, was reversed and

remanded for new trial, the Court considering the refused requests and the oral charge of the judge to which "appellant made no objection," saying Rule 51 should be read in connection with Rule 46. This case is certainly in conflict with the ruling in the case at bar of the Court of Appeals that the refusal of the requests could not be *considered because the exceptions did not specifically point out "the points of conflict between the Court's charge and the law as stated in appellant's requests."* In the *Williams case* the court said at page 156:

> "Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient. *Sweeney* v. *United Features Syndicate,* (2 Cir.) 129 F. 2d 904; *Hall* v. *Aetna Life Insurance Company,* (8 Cir.) 85 F. 2d 447, 451. In our opinion we should consider the objection of appellant to the instruction given."

The statement of the Court of Appeals that Rule 51 "is but a statement of what Federal Courts have said prior to the adoption of the rules" is not an accurate statement. We are now dealing with new rules that should be uniform as to meaning in all Federal Courts. Such, we believe, was one of the reasons for the rules so that the bench and bar might know them with uniformity in all circuits, and thus simplify the practice and make easier the procedure in the administration of justice, and avoidance of technicality. The rule as heretofore analyzed by us we urge is as the two requirements of the rule show, which was the reason for the new rule. The principal

cases cited in the opinion (R. 175) were decided before Rule 51 was made. The case of *Palmer* v. *Hoffman* cited and decided by this Court does not cite Rule 51, nor does this case encompass such record facts as in the case at bar, and we believe is not in point on the record. The case at bar is more like the recent case decided December 12, 1949, of *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct. 200, 206, where this Court granted certiorari and went to the merits as did Judge Learned Hand in the *Sweeney* and *Wright cases, supra,* referring in the Sweeney case to the Ninth Circuit case of *Stoltz* v. *U. S.*, 99 F. 2d 283, 284, citing Section 269 of the Judicial Code as amended 28 U. S. C. A. 391, to the effect that the failure to except which does not affect the substantive rights of the parties should not prevent deciding the cause on the merits. Cf. *Jackson County* v. *Alton R. Co.*, (8 C. A.) 105 F. 2d 633, 638, 639.

The Refused 8 Requests Nos. 3 to 10, Inclusive, Properly Declared the Law of the Case and Should Have Been Given (R. 147, 149).

It may not be necessary at this time to point out the merits of the refused requests, which refusal prevented a fair trial under the law to petitioner but we shall point out some of the high points pertaining thereto.

As previously stated refused requests Nos. 6 and 7 (R. 149) are illustrative of two high points in this connection. Request No. 6 reads as follows:

> "The Court instructs the jury that even should they believe from the evidence the brakes on the tractor and trailer were defective and 'went out' and would not operate as brakes on the tractor or trailer, at the time in question, yet if you further believe such was directly due to lack of reasonable inspection or

failure to exercise reasonable care to have and keep the brakes in a reasonable workable condition for the purpose intended, then such constituted negligence on the part of the defendant owners of the tractor and trailer and the failure, if any, of the brakes to operate for the purpose intended constitutes no defense in this case for the defendant owners of the tractor and trailer."

Such is the settled law of Missouri as held in an automobile collision case of *Shaw* v. *Fulkerson*, 339 Mo. 310, 96 S. W. 2d 495, 498. See also, *Hall* v. *Frisco R. R.*, (Mo. Sup.) 240 S. W. 175, 177. Such governed this case and is universally the settled law, but was not declared as the law in the oral charge of the trial judge. On the contrary the trial judge's confusing charge never mentioned or referred to the point of law referred to in refused request No. 6. All he said on the question of brakes was (R. 139), "It is the contention of the defendants that their conduct in that respect was the result of the failure of the brakes to hold" * * * and then again (R. 140), "In this case it is contended by the defendant that he was not negligent because of the condition of the brakes. It is for you to determine whether or not the brakes did fail to hold or whether, if they did not hold, the driver was negligent in the operation of the car thereafter."

It is thus seen the trial judge nowhere in his oral charge informed the jury that the failure of the brakes to work or operate would not constitute a defense if the failure was directly due to negligence of the defendant owners to keep the brakes in reasonable workable condition, of which there was no evidence at all by the defendants, further than that of the driver Hoyt that the brakes "worked perfect until I started down the hill there at Smithville (R. 83)," who admitted on cross-examination that "it was a most unusual and extraordinary thing (R.

113) for brakes in this condition to go out" and there was no evidence at all as to what caused the brakes to not work or "go out."

Brakes may work perfectly up until they give away and inspection is necessary to keep them in condition for we know they will not last forever and will wear under strain and give way, especially under heavy load as of a heavy oil transport weighing 20 tons. Safety of the public requires such. There was no evidence of inspection of the brakes. It was prejudicial error to refuse Request No. 6. Certainly an oil transport cannot avoid liability by saying my brakes refused to work when on account of such he pulls over onto another's lane of travel and collides with the automobile of the traveler as here in his own lane.

The next high point is the refusal of request No. 7, which is as follows:

> "The Court instructs the jury that the claim of defendants that plaintiff was guilty of negligence is an affirmative defense on the part of defendants and that the burden of proof is on the defendants to prove by a preponderance of the evidence such claim of negligence, and the Court further instructs you that if the defendants have not done so then you must find in favor of the plaintiff on this issue."

The trial judge referred in his oral charge to the burden of proof of contributory negligence once as follows (R. 138):

> "It is the duty of defendants to prove by the preponderance or greater weight of the evidence that the defendant was guilty of 'contributory negligence.'"

Not only was this reference never corrected by the trial judge, but even had it been corrected to read plaintiff

instead of defendant in the last line it would still not be a proper charge for it nowhere uses the words "burden of proof" or tells the jury such is an affirmative defense, and if the defendants have not established such burden of proof, then the jury must find in favor of the plaintiff on this issue. Request No. 7, was a clear perfect request on an issue which involved asserted contributory negligence (R. 151).

Refused requests Nos. 3, 4, and 5, were proper requests and proceeded on the theory of no emergency excusing the defendant owners without proof of inspection, etc., of the brakes as above asserted in refused request No. 6, or in other words defendants could not claim the benefits of an emergency without proof such emergency was not the result of negligence on their part, and no place in the judge's oral charge was such ever so declared to the jury which was one of the essential high points necessary to defendants' defense. We do not believe anyone may read the oral charge and reach the conclusion Petitioner and plaintiff, an honest farmer, had a fair trial of his suit for the death of his wife and serious injuries to himself. We hope this High Court, busy as it is, will find time to read the record and see what actually occurred as to the merits, the result of which, we believe, reflects on the administration of justice.

Urgent Need for Certiorari.

We urge a reference to the cases cited above of other U. S. Courts of Appeals will disclose that the Eighth Circuit Court of Appeals has in refusing to consider the errors of the trial judge in refusing the above requests on the record made and the erroneously holding that the admitted errors in the judge's oral charge and the clarification at the request of the jury, were sufficiently

afterwards, clarified by the judge in the absence of no objection or objection too general, has rendered a decision in conflict with the decisions of other U. S. Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceedings of other Courts of Appeals and this Court, and has so misinterpreted Rule 51 that this Court, since so far as we can find has not construed this rule, that it should grant certiorari and settle the conflict and establish a procedure on an important matter of procedure that will be uniform and just in all Federal Courts.

Respectfully submitted,

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